Supreme Court, U.S.
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No. 98-826

In the Supreme Court of the United States

OCTOBER TERM, 1998

BARBARA HAINES, PETITIONER

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
DAVID M. COHEN
BRYANT G. SNEE
LESLIE CAYER OHTA
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a veteran's claim that the Department of Veterans Affairs committed "clear and unmistakable error" in denying him veterans' benefits survives his death.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 154 F.3d 1298. The opinion of the Court of Veterans Appeals (Pet. App. 12-14) is reported at 10 Vet. App. 446. The opinion of the Board of Veterans' Appeals (Pet. App. 15-19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1998. The petition for a writ of certiorari was filed on November 18, 1998. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A veteran seeking benefits for a "disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty," 38 U.S.C. 1110, 1131, must first present his claim to a Veterans Affairs Regional Office. A final decision by the Secretary (i.e., the Regional Office) denying a claim for benefits may be appealed to the Board of Veterans' Appeals (Board). 38 U.S.C. 511(a), 7104(a). A decision of the Board denying a claim is reviewable in the Court of Veterans Appeals (CVA), 38 U.S.C. 7252(a); decisions of the CVA in turn are in limited circumstances subject to review by the Federal Circuit. 38 U.S.C. 7252(c), 7292.

Prior to 1997, by regulation, a claimant could request that the Regional Office correct an otherwise final decision on the ground that it was based on "clear and unmistakable error" (i.e., a CUE claim). 38 C.F.R. 3.105(a) (1996). In 1997, Congress codified the right to bring CUE claims at the Regional Office level and created a right to bring CUE claims before the Board. Act of Nov. 21, 1997, Pub. L. No. 105-111, 111 Stat. 271 (to be codified at 38 U.S.C. 5109A, 7111). A CUE claim is not a conventional appeal, but rather a collateral challenge to an otherwise final decision.

When a veteran dies, his surviving spouse is not entitled to all the benefits the veteran would have been entitled to had he continued living. Instead, 38 U.S.C. 5121 (Supp. II 1996) entitles a surviving spouse only to "accrued benefits," defined as "periodic monetary benefits * * * to which [the veteran] was entitled at death under existing ratings or decisions, or those based on evidence in the file at the date of death * * * and due

and unpaid for a period not to exceed two years." A claim for accrued benefits under Section 5121 is derivative of the veteran's claim, and a surviving spouse's claim takes the veteran's claims as they stood on the date of death. *Zevalkink* v. *Brown*, 102 F.3d 1236, 1242 (Fed. Cir. 1996), cert. denied, 521 U.S. 1103 (1997).

2. Victor Haines served on active duty from August 1944 to February 1946 and subsequently filed a claim for veterans' benefits pursuant to 38 U.S.C. 1110. In 1982, the Regional Office terminated his total disability rating; Mr. Haines brought a CUE claim challenging that final decision. After the Regional Office denied his CUE claim, Mr. Haines filed an appeal before the Board. While the Board was considering the merits of Mr. Haines's CUE claim, he died on October 7, 1996. Upon learning of Mr. Haines's death, the Board dismissed his appeal, finding as a matter of law that veterans' claims do not survive their deaths. The Board noted that Mr. Haines's widow had a limited right to pursue his rights to benefits by submitting an application for accrued benefits pursuant to Section 5121. Pet. App. 15-19.

3. Petitioner, the widow of Victor Haines, appealed the Board's order of dismissal to the CVA. Petitioner contended that her dead husband's CUE claim survived his death, and therefore that she should be substituted for him and be allowed to continue his CUE claim for retroactive disability benefits (apparently rather than seeking accrued benefits under Section 5121). Relying on its decision in *Landicho* v. *Brown*, 7 Vet. App. 42 (1994), which held that substitution of parties is not permitted when a veteran dies during the pendency of his appeal, the CVA dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 12-14.

4. Petitioner unsuccessfully appealed the CVA's ruling to the Federal Circuit. The court of appeals held that a widow may not pursue her dead husband's CUE claim, because survivors may not be substituted for veterans who die while pursuing claims for benefits. The court rejected petitioner's arguments that 111 Stat. 2271 (to be codified at 38 U.S.C. 5109A) conferred jurisdiction on the Board over the case and that the remedial nature of a CUE claim allows it to survive the claimant's death. Pet. App. 7-8. The court noted that survivors are entitled to file a claim for accrued benefits that were "due and unpaid" at the time of the veteran's death pursuant to Section 5121, and wrote, "The accrued benefits provision thus creates a narrowly limited exception to the general rule that a veteran's claim for benefits does not survive the veteran." *Id.* at 5-6.

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or with any decision of any other circuit court. Moreover, the decision of the court of appeals is correct, and a new regulation makes the question unlikely to recur with any frequency. Accordingly, this case does not merit further review.

1. The Board, the CVA and the Federal Circuit all agreed that a CUE claim does not survive the claimant's death. Nonetheless, petitioner offers several flawed arguments to support her position that her dead husband's CUE claim should not have been dismissed.

a. Petitioner first argues that not allowing a CUE claim to survive the claimant's death "clearly contravenes Congressional intent." Pet. 9. Petitioner did not make this argument below, and, consequently, it is not properly before this Court. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Moreover, peti-

tioner cites no legislative history suggesting that CUE claims survive a claimant's death. Instead, she merely contends that if a CUE claim does not survive the claimant's death, an erroneous decision may stand, "subvert[ing] systemic fairness, thereby undermining the credibility and reliability of the entire adjudication process." Pet. 9. In fact, however, the allegedly erroneous determination was not forever insulated from review. Pursuant to 38 U.S.C. 5121 (Supp. II 1996), petitioner herself was entitled to file a timely application for accrued benefits, claiming that the earlier denial of benefits was based on clear and unmistakable error.[1] See, *e.g.*, *Shields* v. *Brown*, 8 Vet. App. 346 (1995). Furthermore, allegedly erroneous decisions regularly go uncorrected when procedural requirements are not met. See, *e.g.*, *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 239 (1993) (appellate court may dismiss appeal of defendant who is fugitive from justice during pendency of his appeal); *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988) (untimely notice of appeal jurisdictionally bars appeal).

b. Petitioner next asserts that a CUE claim should survive the death of the veteran because it is a "remedial claim" designed to correct a prior error, and under federal common law, remedial actions survive the death of a plaintiff. Pet. 9-10. Because veterans' benefits are created by statute, however, they are not governed by common law. As the Federal Circuit noted, "The CUE claim provision * * * cannot be read as providing a procedure for adjudication or payment of veterans benefits to survivors. The only statutory

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[1] Despite petitioner's apparent concern for "systemic fairness," she has not appealed the denial of her initial accrued benefits claim.

basis providing such a remedy is section 5121." Pet. App. 9. Petitioner tries to avoid this conclusion by arguing that she is not appealing a claim for compensation, but only a claim for error correction. Pet. 10. However, as discussed above, the alleged error could have properly been corrected if petitioner had pursued her claims under Section 5121. Furthermore, petitioner is not adversely affected by—and thus lacks standing to appeal—the Board's dismissal of Mr. Haines's appeal. As the CVA wrote in *Landicho* v. *Brown*, 7 Vet. App. 42, 52-53 (1994), "[B]ecause the * * * [Board] decision, having subsumed the unfavorable [Regional Office] decisions, was in a state of nonfinality at the date of the veteran appellant's death, and because that decision could no longer serve any adjudicatory purpose since the veteran's claims had died with him, that decision was, therefore, rendered without force or effect by his death—meaning that it then became a nullity." Accordingly, petitioner's Section 5121 claim was not precluded by the Regional Office's denial of Mr. Haines's CUE claim, and petitioner lacks standing to pursue an appeal of that denial.

c. Petitioner cites several statutory and regulatory provisions in support of her contention that her dead husband's CUE claim should have survived his death, but none of them in fact supports her claim. For instance, petitioner argues that because Mr. Haines met the initial requirements for bringing a CUE claim (set forth in 111 Stat. 2271 (to be codified at 38 U.S.C. 5109A)) prior to his death, the CUE claim should survive that death. Pet. 11. But no legal principle requires a validly filed claim to survive the plaintiff's death; to the contrary, cases are often dismissed when a party dies after the initial filing requirements are met. See, *e.g.*, *Mosley* v. *United States*, 119 S. Ct. 484 (1998)

(per curiam) (petition for certiorari dismissed when petitioner died after oral argument).

Petitioner also points to 38 U.S.C. 7104(a), which says that final decisions on appeals "shall be made" by the Board. According to petitioner, that provision obligates the Board to review all properly appealed decisions of the Regional Office. Pet. 11-12. Petitioner did not advance this argument below, making it inappropriate for consideration by this Court. See *Adickes*, 398 U.S. at 147 n.2. Even if considered, Section 7104(a) merely requires the Board to render a final decision in all appeals; the Board properly met that obligation here by dismissing the case. See *e.g.*, *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 387-388 (1978) (judgment of dismissal is final, appealable decision).

Finally, (again for the first time before this Court) petitioner offers 38 C.F.R. 20.1302 (1995). Pet. 12-14. When the Board dismissed the case, Section 20.1302 (1995) provided: "When an appeal is pending before the [Board] at the time of the appellant's death, the [Board] may complete its action on the issues properly before it." Petitioner argues that under this provision, Mr. Haines's CUE claim should have survived his death. Peculiarly, the Board cited Section 20.1302 (1995) (which could have been construed to permit the consideration of issues then pending) as authority for dismissing the appeal. Pet. App. 17. However, before the Board issued its decision, the validity of Section 20.1302 (1995) had been implicitly questioned by both *Landicho* v. *Brown*, *supra*, and *Zevalkink* v. *Brown*, 102 F.3d 1236 (Fed. Cir. 1996), cert. denied, 521 U.S. 1103 (1997).[2] And, before the CVA affirmed the Board's

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[2] Petitioner argues that these cases are wrongly decided, because both interpret Section 5121 of the statute without giving

dismissal of Mr. Haines's appeal, the text of Section 20.1302 (1995) was explicitly invalidated as "not 'in accordance with law'" in *Smith* v. *Brown*, 10 Vet. App. 330, 335 (1997).[3]

2. By the time this case was before the Federal Circuit, Section 20.1302 (1995) had been replaced by Section 20.1302 (1997), which explicitly provides: "An appeal pending before the [Board] when the appellant dies will be dismissed." As petitioner points out, Section 20.1302 (1997) does not apply in this case.[4] Pet. 13. Nonetheless, Section 20.1302 (1997) clearly settles for the future the question whether a CUE claim survives the death of a claimant, making the only issue raised by this case unlike to recur.

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deference to 38 C.F.R. 20.611 and 38 C.F.R. 20.1302, in which the Secretary interpreted Section 7104(a). Pet. 14-15. Essentially, petitioner contends that when agency regulations conflict with a statute—here, Section 5121—courts should defer to those regulations. This view of administrative law is incorrect. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

[3] Petitioner acknowledges that Section 20.1302 (1995) was invalidated, but argues that the CVA lacked authority to change the Secretary's interpretation of a statute. Pet. 13 n.1. Petitioner is again mistaken. See 38 U.S.C. 7261(a)(3)(C) (CVA shall "hold unlawful and set aside * * * regulations issued or adopted by the Secretary * * * found to be * * * in excess of statutory jurisdiction, authority, or limitations.").

[4] Oddly, petitioner accuses the government of breaching its ethical and legal duties by failing to notify the court of appeals of this new, inapplicable regulation. Pet. 14. Petitioner offers no authority suggesting that the government is under any obligation to inform the court of invalidated or inapplicable regulations.

Because the decision of the court of appeals conflicts with no decision of this Court or any circuit court, because petitioner's sole contention—that the decision below was wrong—is itself mistaken, and because the question is unlikely to recur with any frequency, further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
DAVID M. COHEN
BRYANT G. SNEE
LESLIE CAYER OHTA
Attorneys

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